

HIGHLY CONFIDENTIAL TRANSCRIPT

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

IN RE:) MDL NO. 1456
PHARMACEUTICAL INDUSTRY) Civil Action No. 01-CV-12257-PBS
AVERAGE WHOLESALE PRICE)
LITIGATION)
)

VIDEOTAPED DEPOSITION OF JEROME A.

SHERMAN, called as a witness on behalf of
the Plaintiffs, pursuant to the applicable
provisions of the Federal Rules of Civil
Procedure, before Jeanette N. Maracas,
Registered Professional Reporter and Notary
Public in and for the Commonwealth of
Massachusetts, at the Offices of Ropes &
Gray, LLP, One International Place, Boston,
Massachusetts, on Thursday, July 7, 2005,
commencing at 9:12 a.m.

1 A. He was president of Warrick.

2 Q. Do you know when he ended being president
3 of Warrick?

4 A. Approximately a year ago.

5 Q. To your knowledge, is he providing any
6 services or employment to Schering-Plough
7 at this time?

8 A. Not to my knowledge.

9 Q. When is the last time you actually talked
10 with Raymond Kapur?

11 A. Probably just before he left.

12 Q. Did you ever talk with Mr. Kapur concerning
13 this litigation?

14 A. No, I did not.

15 Q. When was the last time you talked with
16 Richard Zahn?

17 A. Sometime approximately 12 years ago.

18 Q. That would be either on the phone or in
19 person, same answer?

20 A. Correct.

21 Q. Mr. Sherman, have you ever been in any
22 Warrick offices in Niles, Illinois?

1 A. No.

2 Q. Have you ever been in any Warrick

3 Pharmaceuticals offices in Reno, Nevada?

4 A. No.

5 Q. In connection with your testimony today,

6 we will be discussing some terms that I

7 just want to make sure that we're on the

8 same page with as we go forward, and one

9 of those terms, of course, is AWP or

10 average wholesale price. Do you understand

11 that term?

12 A. Yes.

13 Q. What is your understanding of AWP?

14 A. AWP to me means a benchmark or just a

15 benchmark price.

16 Q. What is your understanding, a benchmark,

17 how is that used in your industry?

18 MR. CHRISTOFFERSON: Objection. You

19 may answer.

20 A. My understanding is it's used for

21 reimbursement.

22 Q. When you say reimbursement, does that mean

1 reimbursement from third-party payers such
2 as insurance companies or public programs
3 such as Medicare, Medicaid?

4 A. Those payers, as well as -- those payers
5 use that, I believe, as well as MAC and some
6 other benchmark's baseline.

7 Q. Is it your understanding that those
8 benchmarks change over time from time to
9 time? Is that a fair statement?

10 MR. CHRISTOFFERSON: Objection. You
11 may answer.

12 A. I'm not aware of that.

13 Q. Now, in connection with your status as a
14 registered pharmacist, are you familiar
15 with any industry publications that are
16 used for pricing services?

17 A. Yes.

18 Q. Would you identify those that you're familiar
19 with.

20 A. Redbook, Price Alert. That's all that I'm
21 aware of.

22 Q. Now, from time to time over the past -- well,

1 A. Average wholesale price.

2 Q. And generating this document for your
3 account, how did you determine what the
4 AWP was?

5 A. I didn't.

6 Q. Who did?

7 A. Harvey Weintraub.

8 Q. And the next column is acquisition price
9 and it says \$30. How did you determine what
10 would be the acquisition price?

11 MR. CHRISTOFFERSON: Objection. You
12 may answer.

13 A. As I recall, we estimated what the market
14 price would be and introduced the product
15 and the price at that time.

16 Q. How was the AWP determined?

17 MR. CHRISTOFFERSON: Objection. You
18 may answer.

19 A. I don't know.

20 Q. Did Harvey Weintraub ever tell you how AWP
21 was determined for purposes of a notice such
22 as Exhibit Sherman 003?

1 A. It was my understanding that it needed to
2 be ten percent below the brand AWP to be
3 considered a generic product, is the way
4 I've been led to believe.

5 Q. Was oxaprozin previously a branded drug or
6 is a branded drug?

7 A. Yes.

8 Q. And what is the brand name for oxaprozin?

9 A. I, frankly, don't remember.

10 Q. Now, if you would, we're going to drop
11 down below the actual, the lines for the
12 two drugs where it says stocking allowance.
13 Do you see that line?

14 A. Yes.

15 Q. What is a stocking allowance?

16 A. On the initial order, we give an account a
17 percentage off invoice for first order.

18 Q. In this particular instance, apparently
19 the discount is none; is that correct?

20 A. That's correct.

21 Q. Now, with regard to the next line where it
22 says pricing, what does that line or that

1 paragraph for price, what does that indicate?

2 MR. CHRISTOFFERSON: Objection. You
3 may answer.

4 A. It indicates that we will adjust the price
5 to this account because we're not sure when
6 we introduce a product to the market with
7 competitors in it, whether or not that price
8 is an appropriate price so we will adjust,
9 and this case, in this case it was 45 days
10 out.

11 Q. If I understand you, does that mean that
12 if the price within 45 days of this notice
13 decreases, is it whether there's going to
14 be an adjustment with the invoice price for
15 any orders that this company makes?

16 MR. CHRISTOFFERSON: Objection. You
17 may answer.

18 A. There will be an adjustment back to the
19 initial order, the first bottle they purchase
20 to the new price.

21 Q. Would that also be an adjustment if there
22 was an increase?

1 Q. And this is a rebate that's a combined
2 market share rebate; is that how you would
3 designate it?

4 A. Yes.

5 Q. Now, with regard as to issuing the rebate
6 on a combined market share rebate, would
7 the rebate come from Schering or would it
8 come from Warrick?

9 A. As I recall people telling me, that Schering
10 paid this particular rebate.

11 Q. And who gave you that information?

12 A. I can't recall who exactly told me that.
13 This is ten years ago.

14 Q. I notice that the account is Cardinal
15 Health and it's addressed to Robert Sykora.
16 Who is Robert Sykora?

17 A. He was my contact at Cardinal.

18 Q. Is Dublin, Ohio, and the address shown for
19 Mr. Sykora, is that the corporate
20 headquarters for Cardinal Health?

21 A. That was.

22 Q. At that time?

1 A. Correct.

2 Q. The remainder of the documents in this
3 exhibit, those are similar generic source
4 or auto sub documents and price notices; is
5 that correct?

6 MR. CHRISTOFFERSON: Objection. You
7 may answer.

8 A. With the exception of J.E. Goold, I'm not
9 sure about that, but the others were auto
10 sub programs.

11 Q. Again, with regard to determining what AWP
12 value, how was that determined for these
13 notices?

14 MR. CHRISTOFFERSON: Objection. You
15 may answer.

16 A. As I said before, my understanding is
17 the AWP for a generic to be considered a
18 generic needs to be ten percent below the
19 brand AWP.

20 Q. Now, in these price notifications that
21 we've looked at so far, are these
22 notifications ever noticed that AWP has

1 changed?

2 MR. CHRISTOFFERSON: Objection. You
3 may answer.

4 A. In these notices that you provided me?

5 Q. Yes, so far.

6 A. The AWP has changed?

7 Q. Yes.

8 A. I'm not aware of that.

9 Q. Has the AWP changed and for purposes of
10 Warrick Pharmaceuticals over time?

11 MR. CHRISTOFFERSON: Objection. You
12 may answer.

13 A. I don't recall us ever changing the AWP
14 once established.

15 Q. When you say once "established," what do
16 you mean by it?

17 A. I mean by that, introduction of the product.

18 Q. Is it correct that once a product is
19 introduced as a Warrick Pharmaceuticals
20 generic, then it keeps that AWP throughout
21 time?

22 MR. CHRISTOFFERSON: Objection.

1 Kinray is another.

2 Q. If you can, just go ahead and across the
3 top, how do the names across the top of the
4 row where it says Albertsons, CVS, Giant
5 Food, Eckerd, Rite-Aid, how does that relate
6 to the column on the far right, if you
7 understand my question?

8 MR. CHRISTOFFERSON: Objection. You
9 may answer.

10 A. The column on the right is the customer and
11 our low price, our low invoice price. The
12 heading, the headers are some customers that
13 we are comparing.

14 Q. So the far right where it says minimum price
15 and customer, that would be, at least at the
16 time of this exhibit, would be the lowest
17 price for that particular NDC?

18 A. Correct.

19 Q. Now, minimum price as shown in this chart,
20 would that be after any rebates or discounts?

21 MR. CHRISTOFFERSON: Objection. You
22 may answer.

1 A. To my understanding, that every document I
2 see has a net price after rebates.

3 Q. Now, this is a document that you have seen
4 and used before --

5 MR. CHRISTOFFERSON: Objection.

6 Q. -- is that correct?

7 MR. CHRISTOFFERSON: Objection.

8 Q. Or similar document, price comparison?

9 A. Similar document.

10 Q. How do you use a price comparison report
11 like Exhibit Sherman 007?

12 A. If a customer comes to me asking me to match
13 a particular price that they've been offered
14 by a competitor, I need to take a look at
15 other customers in a similar marketplace or
16 similar category to be certain that I'm not
17 creating a new low price.

18 Q. And who in the Schering-Plough organization
19 creates the price comparison reports such
20 as the one that we are looking at in Exhibit
21 Sherman 007?

22 MR. CHRISTOFFERSON: Objection. You

1 may answer.

2 A. There's a young lady we have on staff by
3 the name of Jackie Giacalone who reports to
4 John van Schaftan.

5 Q. Now, have these price comparison reports
6 been created and used by yourself for the
7 ten years you've been with or working with
8 Warrick Pharmaceuticals?

9 MR. CHRISTOFFERSON: Objection. You
10 may answer.

11 A. I don't believe so.

12 Q. How far back do these reports go, as far as
13 your knowledge?

14 A. I really don't remember when we started.
15 It's of recent vintage.

16 (Exhibit Sherman 008 marked for
17 identification.)

18 Q. Mr. Sherman, you've been handed what has
19 been marked as Exhibit Sherman 008. Would you take
20 a moment to review that exhibit and then
21 I'll ask you a few questions. And it starts
22 with WAR 0033557 and continues through WAR

1 0033560.

2 A. (Witness examines document)

3 Q. Can you tell me what that document
4 represents?

5 A. This is a document that Cardinal created to
6 have everybody fill out when a new product
7 was introduced or getting a new product,
8 new item add sheet.

9 Q. Does your signature appear anywhere on that
10 page, the first page?

11 A. Yes, sir.

12 Q. That's over authorized signature? Is that
13 your signature?

14 A. Yes.

15 Q. And that's your signature that appears on
16 each page of Exhibit Sherman 008?

17 A. Yes.

18 Q. Okay. And is the handwriting and filling
19 out the form above your signature, is that
20 your handwriting?

21 A. Yes.

22 Q. Now, there's a line for AWP. Do you see

1 that?

2 A. Yes.

3 Q. Where did you get the information to fill
4 out the information relative for AWP for
5 Items 1, 2 and 3 of this form?

6 A. When we introduce a new product, we also
7 create a distributor fact sheet which, as
8 I said before, in order for a product to
9 be considered a generic, it needs to have
10 an AWP listed which is at ten percent below
11 the brand price.

12 Q. And the next line is wholesale acquisition
13 cost/invoice line. Do you see that?

14 A. Yes.

15 Q. And where did you get the information or
16 the numbers or what is represented by the
17 numbers across that line for Items 1, 2
18 and 3?

19 A. That was our estimate of what the acquisition
20 price was going to be for Cardinal.

21 Q. And what is in the parentheses? There's
22 minus 15 percent that goes across that line.

1 What does that represent?

2 A. I'm not sure.

3 Q. For this document, this bid, what is the
4 actual price that you are offering to
5 Cardinal on each of these items, 1, 2
6 and 3?

7 MR. CHRISTOFFERSON: Objection. You
8 may answer.

9 A. As I read this today, I believe that the
10 23.75 is the price, that that was their
11 acquisition price, their invoice price.

12 Q. Does that minus 15, is that some sort of
13 rebate? Now that you've had a chance to
14 look at this document, can you tell me
15 whether that's a rebate or some other type
16 of discount off of acquisition cost or
17 invoice price?

18 MR. CHRISTOFFERSON: Objection.
19 Asked and answered. You may answer.

20 A. I really don't remember.

21 Q. Do you ever use in the course of your
22 business the term "spread"?

1 A. Never.

2 Q. Are you familiar with the term "spread"?

3 A. I've heard it.

4 Q. And for purposes of my questioning this
5 morning, spread, I'm referring to the
6 difference between the invoice price such
7 as reflected here and the AWP. Do you
8 understand that?

9 MR. CHRISTOFFERSON: Objection. You
10 may answer.

11 A. Yes, I do.

12 Q. Is that how you have heard about spread,
13 that being the difference between AWP and
14 an invoice price?

15 A. Yes.

16 Q. Have you heard that in the course of your
17 working for Warrick Pharmaceuticals, there's
18 discussion about the spread?

19 MR. CHRISTOFFERSON: Objection. You
20 may answer.

21 A. I wouldn't characterize it as a discussion.
22 I have heard it. I've been with Warrick

1 ten years. In the generic business, I have
2 heard that.

3 Q. Who would you hear it from? People with
4 Warrick or Schering-Plough or your accounts
5 or all of them, if you can characterize it?

6 MR. CHRISTOFFERSON: Objection. You
7 may answer.

8 A. I have just heard it. I don't know where.

9 Q. In your contact or communications with your
10 accounts, is spread, the difference between
11 AWP and invoice price, is that something that
12 you market or use as a marketing device to
13 sell product?

14 A. No, sir.

15 Q. Have you ever?

16 A. No, sir.

17 Q. Are you aware of anyone in Warrick
18 Pharmaceuticals or Schering-Plough who has
19 ever marketed the spread as a selling point
20 with accounts?

21 MR. CHRISTOFFERSON: Objection. You
22 may answer.

1 A. No, sir.

2 VIDEOGRAPHER: The time is 10:26.

3 We are off the record.

4 (Break taken)

5 VIDEOGRAPHER: The time is 10:34.

6 We're back on the record.

7 (Exhibit Sherman 009 marked for
8 identification.)

9 Q. Mr. Sherman, you've been handed what has
10 been marked as Exhibit Sherman 009. Can you please
11 tell me what that document represents?

12 A. I don't know.

13 Q. Have you ever seen that document before?

14 A. Yes.

15 Q. Okay. And are you familiar with documents
16 of this type? This one is entitled Account
17 Status.

18 A. No.

19 Q. Where have you seen this document before?

20 A. At previous deposition.

21 Q. On the last page of this particular exhibit,
22 there is some handwriting and a signature.

1 Do you recognize that handwriting and
2 signature?

3 A. Yes.

4 Q. Who is that?

5 A. Harvey Weintraub.

6 Q. And this is not a type of report or chart
7 that you have used in the past?

8 MR. CHRISTOFFERSON: Objection.

9 Asked and answered. You may answer.

10 A. No, it is not.

11 (Exhibit Sherman 010 marked for
12 identification.)

13 Q. You've been handed what's been marked as
14 Exhibit Sherman 010?

15 A. Correct.

16 Q. And can you identify what that document
17 represents?

18 A. This is our Warrick price file.

19 Q. What is a Warrick price file?

20 A. It's a record of present and historical
21 prices to a particular account for a
22 particular product.

1 see Q's and M's. Would Q represent
2 quarterly?

3 A. Yes.

4 Q. And M would represent monthly?

5 A. Correct.

6 (Exhibit Sherman 011 marked for
7 identification.)

8 Q. Mr. Sherman, you've been handed what has
9 been marked as Exhibit Sherman 011?

10 A. Yes.

11 Q. Can you identify that document for me?

12 A. (Witness examines document) I'm sorry. What
13 is the question?

14 Q. Tell me what those documents represent.

15 A. This represents those products that I
16 mentioned before, our auto sub products for
17 Cardinal. This is an award.

18 Q. What do you mean by an award? What does
19 that mean?

20 A. RFP on the second page has to do with
21 request for proposal, and we sent them a
22 proposal and they came back to us and said

1 these were awarded to us based upon those
2 prices.

3 Q. And the actual charts that are labeled
4 Cardinal Source Item Listing, is that a
5 chart that is created by Cardinal?

6 A. Yes.

7 Q. What would be the effective time period
8 for such an award, as you described it,
9 for this pricing indicated on the Cardinal
10 source item listing chart?

11 MR. CHRISTOFFERSON: Objection. You
12 may answer.

13 A. I don't know exactly when it was, but down
14 the bottom there's a '96, October '96.

15 Q. And from your experience in dealing with
16 Cardinal, how long would such a pricing
17 agreement or award be in effect with
18 Warrick Pharmaceuticals?

19 A. It could be a very short period of time.
20 It could be a long period of time. It
21 depends on the product, how many competitors
22 there are in the marketplace. As I said

1 before, we're in a commodity market and
2 an awful lot of competitors go after the
3 business if they don't have it.

4 Q. How would changes to the pricing listed
5 on the Cardinal source item listing be
6 affected?

7 MR. CHRISTOFFERSON: Objection. You
8 may answer.

9 A. I don't understand the question. I'm sorry.

10 Q. You said that these prices were an award
11 for a period of time; is that correct? Did
12 I understand you correctly?

13 A. I did not say that.

14 Q. What is the significance of the prices listed
15 on the Cardinal source item listing?

16 MR. CHRISTOFFERSON: Objection. You
17 may answer.

18 A. These are the prices we offered to Cardinal
19 for the various contracts they have in
20 place.

21 Q. And at some point those prices or what you
22 were offering them would change?

1 MR. CHRISTOFFERSON: Objection. You
2 may answer.

3 A. They would change if we chose to keep the
4 business when they were offered a better
5 price by a competitor.

6 Q. Okay. Then my question is, what would be
7 the evidence of the change or the offer of
8 any different prices than what is shown
9 here on this particular exhibit?

10 MR. CHRISTOFFERSON: Objection. You
11 may answer.

12 A. I would receive a phone call or a written
13 document from Cardinal, from my contact,
14 saying XYZ Company in some cases, or no
15 company at all, has offered us X price, will
16 you match. We choose to match if it's an
17 appropriate reaction or not.

18 Q. And what paperwork would you generate if
19 you chose to match a new price or a lower
20 price?

21 MR. CHRISTOFFERSON: Objection. You
22 may answer.

1 A. The price notification documents that you
2 provided me earlier today.

3 (Exhibit Sherman 012 marked for
4 identification.)

5 Q. Mr. Sherman, you've been handed what has been
6 marked as Exhibit Sherman 012, and can you please
7 tell me what that document or exhibit
8 represents?

9 A. (Witness examines document) This represents
10 a response to a document from Harvey
11 Weintraub with regard to specific accounts
12 of mine that had source programs, bona fide
13 as we called it, source programs, and also
14 those accounts that had contracts on
15 Albuterol solution.

16 Q. You used the term "bona fide." Is that as
17 used in contrast to bogus bid contracts or
18 bogus source programs?

19 MR. CHRISTOFFERSON: Objection. You
20 may answer.

21 A. I don't know.

22 Q. You don't know?

1 Was the direct price on this notice subject
2 to a 20 percent rebate?

3 MR. CHRISTOFFERSON: Objection. You
4 may answer.

5 A. Yes.

6 Q. Now, if I can refer you to the next page
7 which is -- what is the difference between
8 this notice and the prior page which is,
9 apparently, they're both going to Samantha
10 Vossenberg of AmeriSource?

11 A. Correct.

12 Q. Can you tell me what the difference is
13 between those two notices?

14 A. Sure. The first one is, in fact, their
15 acquisition price, the top document, the
16 one to AmeriSource Income Rx. AmeriSource
17 Select is their auto sub program. There's
18 always a differential between contract
19 pricing and acquisition pricing, and
20 that's where chargebacks come into play.

21 Q. Okay. Now, on the auto sub program which
22 is described in Bates number WAR 0000534,

1 that has a lower direct price of \$2.39
2 as compared to the source price of \$3.40;
3 is that correct?

4 A. That's correct.

5 Q. Would the \$2.39 direct price to AmeriSource
6 Select, that is also subject to, at least
7 under the terms of this notice, a five
8 percent rebate?

9 MR. CHRISTOFFERSON: Objection. You
10 may answer.

11 A. That's correct.

12 Q. Now, I refer you to the third page in this
13 exhibit which is marked Bates number WAR
14 0000535. Again, this is addressed to
15 Samantha Vossenberg, and what is the
16 difference in this document as compared
17 to the other two?

18 A. This is on November '99. The previous two
19 were in June. So I want you to know I'm
20 guessing now that we obviously got
21 notification from them that a competitor
22 had lowered their price and we needed to

1 match it to remain competitive and in the
2 program.

3 Q. In fact, this particular, this third page
4 of the exhibit reflects a price decrease to
5 \$2.19; is that correct?

6 A. That is correct.

7 Q. Now, that \$2.19 direct price would be subject
8 to additional rebates under the terms of
9 this, on this page; is that correct?

10 A. That's correct.

11 (Exhibit Sherman 029 marked for
12 identification.)

13 Q. Mr. Sherman, you've been handed what has
14 been marked Exhibit Sherman 029?

15 A. Yes.

16 Q. Do you recognize that document?

17 A. This is, obviously, copied to me.

18 Q. I'm sorry. Is that not a letter directly
19 to you from AmeriSource Corporation?

20 A. Yes, it is. However, I see that I was
21 copied by whoever got this across the top.

22 Q. Do you recognize the handwriting across

1 the top of this exhibit?

2 A. No, I don't.

3 Q. Do you know who Bob P. may be? It appears
4 to be a Bob P. Do you see where I'm
5 referring to?

6 A. Yes, I do. No, I don't know who that would
7 be.

8 Q. Now, this is an award notification from
9 AmeriSource Corporation to you?

10 A. Yes, it is.

11 MR. CHRISTOFFERSON: Could this be
12 a good time for a lunch break? It's about
13 quarter past 12:00. Maybe half an hour?

14 MR. McNEELY: Sure. Yeah, let's
15 make it 45 minutes.

16 MR. CHRISTOFFERSON: Okay.

17 VIDEOGRAPHER: The time is 12:12.

18 We are off the record.

19 (Lunch break)

20

21

22

1 A. I get documents from home office.

2 Q. Do you preserve those documents, notices
3 from the home office relative to changes in
4 policy?

5 A. I don't have them. Yes, I suppose we do.

6 Q. When was the last time you received that
7 type of document, a notice of a change in
8 policy?

9 A. It was a few years ago when we got a change
10 in entertainment, what we could spend on
11 entertainment or what we could spend on
12 meals on the road, things of that nature,
13 and this is Warrick I'm talking about.

14 Q. Do you have a folder or file where you
15 have maintained those notices of change in
16 policy?

17 A. No, I don't.

18 Q. The price change notices that we have looked
19 at and marked as exhibits in this case, in
20 this deposition, that is a type of notice
21 that you send out on a regular basis; is
22 that not correct?

1 MR. CHRISTOFFERSON: Objection. You
2 may answer.

3 A. When a price change occurs, certainly.

4 Q. And would it be fair to say that that happens
5 many times a year where you send out that
6 type of notice to all your accounts?

7 A. Only to those accounts that require a price
8 change.

9 Q. And all of those notices, as far as you
10 can testify to, would include the price as
11 well as the new price as well as the AWP;
12 is that correct?

13 MR. CHRISTOFFERSON: Objection. You
14 may answer.

15 A. I haven't seen the AWP on those documents
16 for very long time.

17 Q. When was the last time that you saw a
18 document notifying a price change where
19 AWP was not listed?

20 A. Repeat that, please.

21 Q. You said that you hadn't seen AWP on a
22 price change document in a very long time.

1 When did you start sending out price change
2 notices without AWP on it?

3 A. I don't remember when that occurred.

4 (Exhibit Sherman 030 marked for
5 identification.)

6 Q. Mr. Sherman, you've been handed a document
7 that has been marked Exhibit Sherman 030?

8 A. Yes.

9 Q. And this is a price change notification
10 from you to one of your accounts; is that
11 correct?

12 A. Yes.

13 Q. And the effective date on this price change
14 is, appears to be May 8 of 2000. Is that
15 how you read this document?

16 A. Yes.

17 Q. So as recent as, or at least the year 2000,
18 AWP was still being reported or shown
19 on price change notifications; is that
20 correct?

21 MR. CHRISTOFFERSON: Objection. You
22 may answer.